Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of GTE TELEPHONE OPERATING COMPANIES Tariff F.C.C. No. 1 Video Channel Service at Cerritos, California	)))))))	Transmittal Nos. 874, 909, 918 CC Docket No. 94-81

SUPPLEMENTAL REBUTTAL OF GTE

The GTE Telephone Operating Companies, on behalf of GTE California Incorporated and GTE Service Corporation

John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(214) 718-6969

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

Their Attorneys

September 21, 1995

TABLE OF CONTENTS

		PAGE
SUMMARY		iii
I.	Introduction	1
II.	Apollo's Tired Legal Arguments Challenging Abrogation of the Pre-existing Contracts Are Still Without Merit	2
	A. The *Armour Packing* Rule and the Filed Rate Doctrine Are Fully Applicable to the Instant Case.	2
	B. The "Substantial Cause" Test Is Inapplicable To GTECA's Tariff Filings	5
	C. Even If GTECA's Tariff Filings Required a Showing "Substantial Cause", This Showing Has Been Readily Made in the Instant Case	7
III.	The Tariff Submitted for Service Corp. (Transmittal 874/909/918) Does Not Conflict In Any Material Way With the Pre-Existing Contracts	9
	A. GTECA Has Already Established That the Tariffs Properly Incorporate All of the Lawful Provisions of the Pre-existing Agreements. Apollo Has Failed to Show Otherwise	10
	B. Transmittal 874/909/918 Does Not Conflict With Apollo's Contingent Right of First Refusal	10
	C. Transmittal 874/909/918 Does Not Conflict With the GTECA - Apollo Non-Compete Clause	13
	D. Transmittal 874/909/918 Does Not Conflict with the Service Corp. - Apollo Non-Compete Clause	13
	E. Transmittal 874/909/918 Does Not Establish Service Corp. as a Competitor of Apollo in Violation of the Service Corp. - Apollo Non-Compete Clause	15
	F. GTECA's Tariff Arrangement With Service Corp. Is Neither Collusive Nor Anticompetitive	16
IV.	The Tariff Submitted for Service Corp. (Transmittal 874/909/918) Does Not Exceed GTECA's Existing or Requested Section 214 Authority	19
V.	The Tariff Rates Proposed for Service Corp. Are Not Discriminatory	19

A. Analysis of the Tariff Charges 20

B. Analysis of the Montgomery Study 24

1. Lease charges would have been substantially different had the initial service offerings to Apollo and Service Corp. been provided under tariff 25

2. Tariffed charges established for both Apollo and Service Corp. adequately insure recovery of all underlying investment 27

3. Administrative and maintenance expense amounts recovered are consistent with standard pricing practices and the Commission's cost recovery principles 29

4. Lease charges contained in Apollo's original contracts and the tariffs contain no additional "economic value" other than recovery of GTECA's $12 million investment on behalf of Apollo and Service Corp. 33

C. Apollo is Not Due a Refund as a Result of the Establishment of Reasonable Cost-Based Charges for Service Corp. 34

VI. Conclusion 35

SUMMARY

Upon expiration of the Commission's five year waiver in July, 1994, GTECA and the users of its coaxial broadband network in Cerritos, California -- Apollo and Service Corp. -- were required to come into compliance with the Act and the Commission's implementing regulations. The sole purpose of GTECA's Cerritos-related tariff filings was to comply with these statutory and regulatory mandates. GTECA's video channel service tariffs supplant pre-existing contracts with Apollo and Service Corp., and establish rates, term and conditions of service, in order to achieve this result. Despite rehashing its tired legal arguments, Apollo has not shown that regulatory abrogation of the pre-existing contracts is not proper.

In this investigation, GTECA has demonstrated that its tariffing and pricing methodologies insure that the costs of the Cerritos operations are borne equally by Apollo and Service Corp., the only two users of the system, and that no ratepayers of other telecommunications services provided by GTECA will subsidize the costs of providing video channel service in Cerritos. GTECA has also demonstrated that the charges applied to Service Corp. are non-discriminatory and are reasonable since they recover the underlying regulated costs that GTECA proposes to transfer into regulated accounts.

Apollo's contention that it is due a refund of the investment amounts for which

(retroactively) to Apollo's Lease Agreement charges would actually result in Apollo *owing* GTECA additional monthly charges of $9,791, nor any refund as Apollo claims.

GTECA has further demonstrated that the tariff submitted for Service Corp. conflicts neither with Apollo's "right of first refusal" not with the Service Corp. - Apollo "non-compete clause." Additionally, the tariff is wholly consistent with GTECA existing (interim) and pending Section 214 authority.

As GTECA's tariffs have been lawfully filed and are fully cost consistent with standard ratemaking principles and Commission rules, the Bureau should terminate this investigation as soon as practicable.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of GTE TELEPHONE OPERATING COMPANIES Tariff F.C.C. No. 1 Video Channel Service at Cerritos, California	)))))))	Transmittal Nos. 874, 909, 918 CC Docket No. 94-81

SUPPLEMENTAL REBUTTAL OF GTE

The GTE Telephone Operating Companies, on behalf of GTE California Incorporated (GTECA) and GTE Service Corporation (Service Corp.), respectfully submit this Supplemental Rebuttal in accordance with the Common Carrier Bureau's Supplemental Designation Order, DA 95-1769, released August 14, 1995 (*Supplemental Designation Order*), and in response to the Supplemental Opposition of Apollo CableVision, Inc. (Apollo).

I. Introduction.

In this Supplemental Rebuttal, GTECA demonstrates that the tariff rates proposed for Service Corp. in Transmittal Nos. 874/909/918 are lawful and nondiscriminatory. As such, Apollo's strategy to derail GTECA's continue provision of video signal transport to Service Corp. fails and Apollo's demand that it is somehow owed a refund based upon charges assessed to Service Corp. is wholly without merit. The Commission should therefore permit GTECA's video channel service tariff for Service Corp. to remain in effect as filed and terminate this investigation as expeditiously as practicable.

II. Apollo's Tired Legal Arguments Challenging Abrogation of the Pre-existing Contracts Are Still Without Merit.

Despite GTECA's persuasive (and exhaustive) demonstration respecting the applicability of the *Armour Packing* rule[1] and the filed rate doctrine[2] to the instant case, Apollo continues to demand that GTECA show something more to support the lawfulness of the tariffs. Quite simply, Apollo's tired legal arguments challenging regulatory abrogation of the pre-existing contracts remain without merit.

A. The *Armour Packing* Rule and the Filed Rate Doctrine Are Fully Applicable to the Instant Case.

GTECA shall not repeat the legal arguments already presented to the Commission. However, in light of Apollo's continued obfuscation -- both legal and factual -- five salient points of law do bear reiteration.

First, the Commission has quite explicitly assumed and exercised its Title II jurisdiction over the Cerritos network time and time again, initially by granting GTECA Section 214 authority to provide video signal transport to Apollo and Service Corp.,[3] and then by issuing order after order since that time requiring GTECA to comply with the

---

1 *Armour Packing Co. v. United States*, 209 U.S. 56 (1908). *See* Direct Case of GTE, August 15, 1994, at 25-32; Comments of GTE, September 15, 1994, at 6-12; GTE Rebuttal to Opposition and Reply Comments, September 30, 1994, at 9-18.

2 Motion of GTE California Incorporated for Declaratory Ruling, February 8, 1995, at 9-14; Reply of GTE California Incorporated to Apollo's Opposition to Motion for Declaratory Ruling, March 15, 1995, at 8-13; Opposition to Apollo's Request for Leave to File Response, or In the Alternative, GTECA's Request for Leave to File a Response to Apollo's Response, April 7, 1995, at 7-8.

3 *In re General Telephone Co. of California*, 3 FCC Rcd 2317 (Com.Car.Bur. 1988) (*Waiver Order*); *In re General Telephone Co. of California*, 4 FCC Rcd 5693 (1989) (*Cerritos Order*).

statutory provisions of the Act and the Commission's implementing regulations.[4] The fact that GTECA and Apollo might become subject to the Commission's jurisdiction after execution of the pre-existing contracts was a circumstance specifically envisioned by the parties and provided for in the Lease Agreement.[5]

Second, since the initial grant of Section 214 authority, GTECA has provided video signal transport to Apollo and Service Corp. on a common carrier basis. Apollo's arguments to the contrary are quite specious, in light of (1) the Commission's rejection of this argument in the *Cerritos Order*; (2) the Bureau's contrary ruling in the *Cerritos Tariff Order*; the very language of the tariffs which make clear that GTECA's video channel service offering is a general offering.[6]

Third, upon expiration of the waiver in July, 1994, GTECA, Apollo and Service Corp. were required to come into compliance with the Act and the Commission's implementing regulations. Such compliance required -- among other things -- that

---

[4] *E.g.*, *In re General Telephone Co. of California*, 8 FCC Rcd 8178 (1993) (*Remand Order*); *In re GTE Telephone Operating Companies*, 9 FCC 3613 (Com.Car.Bur. 1994), *applications for review pending* (*Cerritos Tariff Order*); *In re GTE Telephone Operating Companies*, 9 FCC Rcd 5229 (Com.Car.Bur. 1994) (*Transmittal 909 Suspension Order*); *Supplemental Designation Order*.

[5] Lease Agreement, ¶ 19 ("If the ... FCC claim[s] Title II jurisdiction over the service provided by [GTECA], [Apollo] shall be subject to the rates, terms and conditions such agency may impose."); *see* Direct Case of GTE, August 15, 1994, at 27-28.

[6] *See* Opposition to Apollo's Request for Leave to File Response, or in the Alternative, GTECA's Request for Leave to File a Response to Apollo's Response, April 7, 1995, at 2. Apollo's has most recently recapitulated its common carriage versus private carriage assertions in a pleading entitled "Supplemental Application for Review and Petition for Expedited Consideration", filed September 12, 1995. GTECA will timely respond to this pleading on September 27, 1995, and therefore will not further address it here except to note that Apollo continues to ignore Commission precedent. *See In re Ohio Bell Tel. Co.*, 1 FCC Rcd 942 (Com.Car.Bur. 1986); *In re Pacific Bell Tel. Co.*, 60 Rad.Reg.2d (P&F) 1175 (Com.Car.Bur. 1986); *In re C & P Telephone Co.*, 57 Rad.Reg.2d (P&F) 1003 (Com.Car.Bur. 1985).

GTECA provide video signal transport only in accordance with a properly filed tariff.[7] Apollo readily admits the same,[8] and certainly could not do otherwise as the Commission's rules have -- for nearly thirty years -- made clear that the transport of video signal by a common carrier (such as GTECA) for a customer (such as Apollo or Service Corp.) may be made only pursuant to tariff.[9] Accordingly, GTECA specifically designed the tariffs in order to bring the parties into compliance with (1) Section 203(a) of the Act; (2) Section 63.54's carrier-user limitation; and (3) Section 61.38's pricing rules.[10]

---

7 47 U.S.C. §§ 203(a), 533(b); 47 C.F.R. §§ 61.1(c), 63.54(c); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S.Ct. 2223, 2231 (1994); *Maislin Industries U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990).

8 Opposition of Apollo CableVision, Inc., September 15, 1994, at 9 n. 7 ("Apollo does not argue here that a tariff must not be filed.").

9 Motion of GTE California Incorporated for Declaratory Ruling, February 8, 1995, at 6 n. 3. *See In re Public Broadcasting Service*, 39 Rad.Reg. (P&F) 1516 (1977); *In re Midwestern Relay Co.*, 59 FCC 2d 477 (1976), *recon. denied*, 69 FCC 2d 409 (1978), *aff'd sub nom. American Broadcasting Co. v. F.C.C.*, 643 F.2d 818 (D.C.Cir. 1980); *In re United Video, Inc.*, 49 FCC 2d 878 (1974), *recon. denied*, 55 FCC 2d 516 (1975); *In re General Telephone Co. of California*, 13 FCC 2d 448 (1968).

10 GTE Rebuttal to Opposition and Reply Comments, September 30, 1994, at 9-10.

Fourth, once the tariffs became effective, both customers -- Apollo and Service Corp. -- were required to strictly comply with the rates, terms and conditions set forth in the tariffs.[11]

Fifth, the instant case is identical in all pertinent respects to *United Video*, wherein the Commission properly applied the *Armour Packing* rule, except that GTECA has *not* proposed any "major revision"[12] to Apollo's or Service Corp.'s rate structures. Thus, "the effective rates, practices, and regulations are those which appear in [GTECA's] tariff[s] on file with the Commission and such tariff[s], the Commission's Rules, and the Act itself, are applicable as a matter of law, notwithstanding any conflicting provision appearing in an agreement executed by [GTECA] with [Apollo or Service Corp.]." *United Video*, 49 FCC 2d at 880 and 55 FCC 2d at 516.

B. The "Substantial Cause" Test Is Inapplicable To GTECA's Tariff Filings.

Apollo cites *In re Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562 (1995), for the broad proposition that the Commission has extended the "substantial cause" test to whenever a filed tariff reflects pre-existing contract terms.[13]

---

[11] Lease Agreement, ¶ 19; *Maislin Industries*, 497 U.S. at 126 ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier ..."); *Keogh v. Chicago & Western Railway Co.*, 260 U.S. 156, 162-63 (1922); *Square D. Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986) (reaffirming filed rate doctrine despite emergence of subsequent procedural and judicial developments); *Southwestern Bell Corp. v. F.C.C.*, 43 F.3d 1515, 1524 (D.C.Cir. 1995) ("rate filing was Congress' chosen means of preventing unreasonableness and discrimination"); *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989) (enforcement of pre-existing contract term "would be giving a preference to and discriminating in favor of the customer in question."); *Cincinnati, N.O. & T.P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483 (4th Cir. 1971) (existence of pre-existing contract is irrelevant to the rate which must be paid by the customer).

[12] *See United Video*, 49 FCC 2d at 878.

[13] Supplemental Opposition, 5-7.

The Commission has done no such thing. Indeed, the factual predicate existing in *Interstate Interexchange* -- that GTECA is permitted to offer contract-based video signal transport absent a waiver -- is absent here. Apollo's reliance upon *Interstate Interexchange* is therefore wholly misplaced.

Initially, it should be recalled that Apollo has previously told the Commission that Apollo "does not request that its earlier agreements be afforded a tariff-like status."[14] However, Apollo now strives to afford the pre-existing contracts precisely this status in its attempt to extend *Interstate Interexchange* to the instant case. This is a proverbial attempt to fit a square peg into a round hole, which is quite impossible because the factual predicate upon which the *Interstate Interexchange* decision is based is simply absent here.

As the Commission made quite clear, the predicate to application of *Interstate Interexchange* is that the carrier is permitted to offer contract-based carriage in the first instance. For dominant carriers, contract-based carriage is only permissible with respect to those services that are subject to further streamlined regulation. *Id.*, at 4563, n. 6. However, Apollo has made no showing -- nor can it -- that GTECA is either a nondominant carrier or that the provision of GTECA of video channel service is subject to streamlined regulation.[15] Nor has Apollo shown that, after expiration of the waiver in July, 1994, GTECA was permitted to provide contract-based service to Apollo and

---

[14] Opposition of Apollo CableVision, Inc., September 15, 1994, at i.

[15] The Commission has recently rejected the application of streamlined regulation to another video transport service, video dialtone. *Commission Adopts LEC VDT Price Cap Rules; Comments Sought on Two Additional Issues*, CC Docket 94-1, News Release, September 14, 1995.

Service Corp.[16] Absent these predicate showings, *Interstate Interexchange* is inapplicable on its face.

Apollo's attempt to apply *Interstate Interexchange* to the instant case also flies in the face of clear Commission precedent. Indeed, in *Midwestern Relay*, considered -- and rejected -- application of the "substantial cause" test where pre-existing contract terms were subsumed into a long term service tariff for *common carrier video signal transport*. Said the Commission: "Petitioners have not distinguished this case from *United Video* on any relevant grounds." *Id.*, 69 FCC 2d at 414. The Commission therefore applied the *Armour Packing* rule and dismissed the petitions to reject the tariff revisions. As previously noted,[17] *Midwestern Relay* is directly on point, notwithstanding Apollo's reliance on the *Interstate Interexchange* case which is inapplicable on its face.

C. Even If GTECA's Tariff Filings Required a Showing "Substantial Cause", This Showing Has Been Readily Made In the Instant Case.

For reasons that defy logic, Apollo continues to assert that "[GTECA] has not even *attempted* a substantial cause showing here."[18] To the contrary, as GTECA has repeatedly shown, what more substantial cause could there be than to bring the parties into compliance with the Act and the Commission's Rules? As the Commission is well aware, the *sole purpose* of GTECA's tariff filings was to comply with statutory and regulatory mandates. GTECA's video channel service tariffs supplant the pre-existing

---

[16] Thirty years of precedent make clear that Apollo could not make this showing. *See* n. 9, *supra*.

[17] GTE Rebuttal to Opposition and Reply Comments, September 30, 1995, at 14-16.

[18] Supplemental Opposition, at 7 (emphasis in original).

contracts, and establish rates, term and conditions of service, *only* to achieve this result.

Apollo's substantial cause argument rests on the premise that the pre-existing contracts by and among GTECA, Apollo and Service Corp. were legitimate.[19] While there is little doubt that this was the case *prior to* expiration of the waiver in July, 1994, certain pre-existing contractual relationships clearly were *not* permissible after waiver expiration. For example, Apollo has never denied -- and, indeed, cannot deny -- that GTECA's provision of service to Apollo became subject to Section 63.54's carrier-user limitation with expiration of the waiver.[20] The parties also became subject to Section 203(a) of the Act and Section 61.38's pricing rules. In reality, GTECA's tariff filings did nothing more than to comply with these statutory and regulatory mandates, and were thus involuntary upon the part of GTECA.[21]

---

[19] Opposition of Apollo CableVision, Inc., September 15, 1995, at 7.

[20] With respect to the Maintenance Agreement, *see, e.g.*, GTE Rebuttal to Opposition and Reply Comments, September 30, 1994, at 16 n. 13.

[21] In state court proceedings, as before the Commission, Apollo continues to allege that GTECA somehow had a myriad of "options" available to it as waiver expiration approached. Thus, Apollo continues to declare, GTECA's tariff filings were somehow "voluntary". In the *Remand Order* -- which revoked *both* the waiver and GTECA's underlying Section 214 authority -- the Commission mentioned four specific possibilities for achieving compliance: (1) divestiture by GTECA; (2) removal of Apollo as the franchised cable operator; (3) provision of video channel service; and (4) provision of video dialtone. Since GTECA had no authority to remove Apollo has the franchised cable operator, nor to require that Apollo submit itself to the Commission's video dialtone rules, only two options existed in reality: divestiture or channel service. Since channel service alone permitted GTECA to continue to provide video signal transport service to its customers, Apollo and Service Corp., GTECA chose this option. Of course, the other "option", divestiture, had never been suggested to be required upon waiver expiration either in the *Cerritos Order* or in any other Commission order. In any event, divestiture would have caused GTECA irreparable injury. *See* Declaration of Virginia K. Sheffield, at 6-11, attached as Exhibit 7 to Apollo's Opposition to GTE Motion for Declaratory Ruling, February 23, 1995.

Apollo has essentially posited a reality which did *not* exist in July, 1994: that GTECA could lawfully ignore expiration of the waiver and continue to provide service in explicit violation of the Act and the Commission's Rules. As GTECA has previously explained,[22] Apollo's view left GTECA with a devil's bargain: either ignore expiration of the waiver or submit a tariff which failed to comply with federal law -- thereby making Apollo happy, but which would have been patently unlawful -- or submit a tariff which complied with statutory and regulatory mandates (as GTECA did) -- thereby earning Apollo's wrath, and which Apollo demands that the Commission reject. Such a Catch 22 is not the law -- whether under the "substantial cause" test or otherwise -- and never has been.

III. The Tariff Submitted for Service Corp. (Transmittal 874/909/918) Does Not Conflict In Any Material Way With the Pre-Existing Contracts.

Despite its protestations to the contrary,[23] Apollo has never cogently explained *how* GTECA's tariff filings differ in any material respect with the pre-existing contracts. Rather, Apollo has attempted to substitute rhetoric for hard facts. Apparently, Apollo believes that if it repeats itself enough times, fantasy may replace reality. An examination of the *facts* -- as opposed to rhetoric, no matter how vehement -- is therefore in order.

---

[22] GTE Rebuttal to Opposition and Reply Comments, September 30, 1994, at 14-15.

[23] Supplemental Opposition, at 8.

A. GTECA Has Already Established That the Tariffs Properly Incorporate All of the Lawful Provisions of the Pre-existing Agreements. Apollo Has Failed to Show Otherwise.

GTECA has already provided the Commission with an express comparison of the respective contract and tariff provisions applicable to Apollo which conclusively demonstrates that there are no "significant disparities" (as Apollo claims) between the pre-existing contracts and the tariffs.[24] GTECA has also conclusively demonstrated that, despite Apollo's rhetoric, GTECA rightful assumption of its common carrier obligations under the tariffs did not (and does not) material alter Apollo's business operations.[25] In so doing, GTECA persuasively refuted Apollo's factual misstatements, omissions, errors, inaccuracies and misleading innuendoes. Therefore, GTECA will not repeat these matters here.

B. Transmittal 874/909/918 Does Not Conflict With Apollo's Contingent Right of First Refusal.

Initially, Apollo complains that GTECA "proposes to install [Service Corp.] as a permanent occupant of one-half of the system bandwidth contradict[ing] the most basic contractual understanding of the parties."[26] This is merely a rehash of Apollo's contention that the thirty-nine channels not leased to Apollo were only "temporarily reserved" for Service Corp. and that "[Service Corp.] would terminate its use of the system bandwidth at the conclusion of the [five year waiver] period" at which time

---

[24] Direct Case of GTE, August 15, 1994, Attachment E to the Declaration of W. Scott Randolph. *See also* Direct Case of GTE, August 15, 1994, at 11-16 (which analyzes in detail each of the respective contract and tariff charges).

[25] Comments of GTE, September 15, 1994, at 19-32.

[26] Supplemental Opposition, at 8.

"Apollo would accede to the use of [Service Corp.'s] bandwidth through rights of first refusal."[27] The speciousness of this assertion is readily apparent.

As Apollo is well-cognizant, GTECA entered into coordinate 15-year lease agreements with it and Service Corp., each for half of the system bandwidth. The Service Corp. Lease Agreement was executed shortly after release of the *Waiver Order* in 1988. The *Waiver Order* contained no temporal limitation on the waiver, in contrast to the Commission's subsequently issued *Cerritos Order* which limited the waiver to five years. The *Cerritos Order*, issued *after* execution of the respective 15-year lease agreements, is the *first* mention *anywhere* of a five year limitation. Thus, contrary to Apollo's contention, at the time the parties entered into the lease agreements, they fully anticipated that GTECA would provide service to *each* customer for fifteen -- not five -- years.

The language of Apollo's contingent right of first refusal, which appeared in the original GTECA Lease Agreement dated January 22, 1987 – also well before the *Waiver Order* -- confirms this result. That provision read:

> "Owner [GTECA] agrees that if bandwidth capacity in excess of 275 MHz should become available, Lessee [Apollo], or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at such terms and subject to such provisions as are mutually agreed to by the parties."

---

[27] Brief on Behalf of Apollo CableVision, Inc., August 15, 1995, at 3.

Lease Agreement, ¶ 21 (emphasis added). And this permissive "if ... should" language was deliberately maintained by the parties when Apollo's contingent right of first refusal was subsequently modified *even after adoption of the five year waiver limitation imposed by the Cerritos Order.*[28] Lease Agreement, Amendment No. 2, ¶ 8. *Nowhere* did the parties state that GTECA's provision of video signal transport to Service Corp. would be limited to the five year waiver period.[29]

Apollo further contends that it "exercised its right to accede to the use of the [Service Corp.] bandwidth", relying upon GTECA's offer of the Service Corp. channels at a tariff rate which Apollo expressly rejected.[30] As GTECA has previously explained, it is a matter of first-year contract law that Apollo's rejection of a material term of the offer -- the price -- effected a revocation of GTECA's offer. *Landberg v. Landberg,* 24 Cal.App.3d 742, 750 (1972) ("a valid acceptance must be absolute and unqualified (Civ. Code § 1585), and [a] qualified acceptance constitutes a rejection terminating the offer"). Indeed, even if GTECA's offer had not been revoked by Apollo's rejection of a material term, Apollo's conditional "acceptance" -- conditioned upon "the parties' mutual agreement to a different sum" by November 30, 1993 -- never occurred. For its part, GTECA not only explicitly rejected Apollo's counteroffer but formally withdrew its initial

---

[28] The five year waiver limitation was, itself, not set in stone, as the Commission expressly permitted GTECA to seek extension of the waiver at the end of the five year period. *Cerritos Order,* 4 FCC Rcd at 5700.

[29] *See* Comments of GTE, September 15, 1994, at 14-15.

[30] Supplemental Opposition, at 9-10.

offer.[31] Thus, Apollo has absolutely no right in law or in fact to dispossess Service Corp. of Service Corp.'s valuable interest in its 39 channels.

As Apollo's right of first refusal is simply a contingent right, which Apollo has never exercised, GTECA's provision of service under tariff to Service Corp. is fully consistent with the pre-existing contractual provision. Indeed, Apollo's contingent right of first refusal has been expressly incorporated in the tariff submitted for Apollo. When, and if, Service Corp.'s channels become available, GTECA shall comply with this provision.

C. Transmittal 874/909/918 Does Not Conflict With the GTECA - Apollo Non-Compete Clause.

Apollo appears to complain that the tariff submitted for Service Corp. violates the non-compete clause of in Apollo's pre-existing Lease Agreement. Apollo correctly quotes the non-compete clause contained in Amendment No. 2 to the Lease Agreement (¶ 7) and the coordinate provision set forth in the tariff submitted for Apollo (Transmittal 873, Section 18.4(a)(3)). These provisions are identical, except that "Telephone Company" is substituted for "GTEC" in the tariff. Therefore, there is simply no disparity between the pre-existing contractual provision and the tariff provision.[32]

D. Transmittal 874/909/918 Does Not Conflict with the Service Corp. - Apollo Non-Compete Clause.

Apollo next complains that the tariff submitted for Service Corp. violates the non-compete clause contained in the Enhanced Capability Decoder (Converter Box)

---

[31] Comments of GTE, September 15, 1995, at 16-19.

[32] Whether it is appropriate to include such a non-compete provision in a tariff is an issue which the Commission has not yet addressed, and GTECA anticipates that this will be determined by the Bureau in its order upon competition of this investigation.

Agreement (¶• 2(d)) between Service Corp. and Apollo. However, as GTECA has previously explained, inclusion of Service Corp. - Apollo contract terms in GTECA's tariff would not be appropriate.[33]

Transmittal 874/909/918 describes the terms and conditions under which GTECA provides regulated video channel service to Service Corp. GTECA is the regulated, issuing entity of the tariff, not Service Corp. Since Service Corp. is not providing Apollo with any regulated service, Apollo's claims in this respect are immaterial to this investigation. In essence, Apollo demands that the Commission enforce a term of a pre-existing contract (now under dispute between the parties in the state court action) by requiring that a third party, GTECA, include this term in its tariff. There is no basis in law, fact, or Commission practice for such a result.

Apollo attempts to interject the Commission as enforcer of the Service Corp.-Apollo Enhanced Decoder Agreement by maintaining that "[a]ll of these agreement were interrelated and interdependent, and Apollo relied on each of them -- and on [GTECA]'s participation -- in executing the others."[34] Thus, Apollo demands, the Commission is required to enforce the Service Corp. - Apollo non-compete clause though its tariff proceedings. Unfortunately for Apollo, GTECA has already conclusively demonstrated that the very language of the contracts in question provide that they are stand alone agreements and that each contains the *entire* understanding of the

---

[33] Comments of GTE, September 15, 1994, at 31.

[34] Supplemental Opposition, at 13.

parties.[35] Thus, any evidence of the parties' understandings or intentions outside of these agreements -- in Apollo's language, "a series of interrelated contracts" -- is wholly irrelevant. Cal. Civil Code § 1625; Cal. Code Civ. Proc. § 1856(a); *Salyer Grain & Milling Co. v. Henson*, 13 Cal.App.3d 493, 501 (1979); *Hanarahan-Wilcox Corp. v. Jenison Machinery Co.*, 23 Cal.App. 642, 646 (1937).

E. Transmittal 874/909/918 Does Not Establish Service Corp. as a Competitor of Apollo In Violation of the Service Corp. - Apollo Non-Compete Clause.

Based upon Service Corp.'s tendering of franchise fees to the City, Apollo contends that "[GTECA] and [Service Corp.] are attempting to establish the latter as a competitor of Apollo in Cerritos ..."[36] In reality, in another proceeding,[37] the City has already demonstrated that Service Corp. is *not* a competitor of Apollo, even within the broad terms of the 1992 Cable Act.[38] Furthermore, it is more than curious that Apollo now claims that the tender of Service Corp.'s tender of franchise fees is a breach of one of its contracts while at the same time demanding that the tariff contain language requiring Service Corp. to obtain a cable franchise.[39] Quite apparently, Apollo is

---

[35] Comments of GTE, September 15, 1995, at 19-20. *See, e.g.*, Lease Agreement, ¶ 15, Amendment No. 1, ¶ 3, Amendment No. 2, ¶ 9, Amendment No. 3, ¶ 6; Enhanced Capability Decoder Agreement, ¶ 6; Service Agreement, ¶ 14, Amendment No. 1, ¶ 10, Amendment No. 2, ¶ ; Maintenance Agreement, ¶ 12, Amendment No. 1, ¶ 4.

[36] Supplemental Opposition, at 13.

[37] *In the Matter of Apollo CableVision, Inc. Concerning the Certification of Cerritos, California (CA 1450) to Regulate Basic Cable Service Rates.*

[38] Regulation of basic cable rates is dependent upon a finding that no "effective competition" exists. 47 C.F.R. §§ 76.905-76.906. The parties do not disagree that the "effective competition" test is different from the restrictions set forth in the Service Corp. - Apollo non-compete clause. Supplemental Opposition, at 14 n. 8.

[39] Supplemental Opposition, at 25-26.

attempting to place Service Corp. in its own Catch 22: comply with the tariff and violate the non-compete clause *or* violate the tariff by continuing to provide NVOD and non-programming services.

The true perversity of Apollo's contention regarding the Service Corp. - Apollo non-compete clause becomes instantly apparent when one examines Apollo's "suggested language" for inclusion in the tariff.[40] While the Service Corp. - Apollo non-compete clause specifically *permits* Service Corp. to provide video-on-demand (VOD) and near video-on-demand (NVOD) services,[41] Apollo's "suggested language" deliberately omits this term. While it is unlikely that Apollo could be attempting to mislead the Commission with such an obvious ploy, such machinations do demonstrate the lengths to which Apollo will go in its attempt to dispossess Service Corp. of its valuable interests in half the bandwidth. Apollo's "suggested language", while wholly inappropriate for inclusion in GTECA's tariff in the first instance, is expressly in conflict with the pre-existing contract. Thus, Apollo's calculated effort to manipulate this investigation to its own benefit must be rejected.

F. GTECA's Tariff Arrangement With Service Corp. Is Neither Collusive Nor Anticompetitive.

GTECA has already confirmed that it will not favor one customer on the Cerritos video network -- either Apollo or Service Corp. -- over the other. Indeed, it is in

---

[40] Supplemental Opposition, at 25.

[41] Supplemental Opposition, at 11-12, quoting ¶ 2(d) of the Enhanced Capability Decoder Agreement.

GTECA's best interest to assure that no preferential treatment occurs so that channel capacity is fully utilized.[42]

It is unclear for what relevant purpose Apollo rehashes its specious claims of collusion and anticompetitive conduct. In reality, none of the disastrous consequences which Apollo contended would occasion conversion of GTECA's provision of service from a contract basis to the tariff arrangement required by the Act and the Commission's Rules has occurred. One need only recall the long "list of horribles" which Apollo so vehemently insisted would occur to recognize Apollo's most recent hyperbole. Three of Apollo's more outrageous claims come readily to mind:

First, Apollo contended that allowing GTECA's tariffs to take effect "would promptly force a default on Apollo's bank loan" and that "the City of Cerritos [was] about to lose its only cable service."[43] Of course, despite the effectiveness of the tariffs, neither of these events occurred.

Second, Apollo contended that, for a variety of technical reasons, GTECA's video network could not accommodate two programmers. In particular, Apollo claimed that the network's data carrier could not support two distinct billing systems (one for Apollo and one for Service Corp.).[44] Of course, two billings systems have now been in effect for more than a year, despite Apollo's predictions.

---

[42] Consolidated Reply to Petitions to Reject or Suspend Tariffs, June 1, 1994, at 28.

[43] Correspondence from C.J. Robak, Apollo, to the Hon. Reed E. Hundt, FCC, July 1, 1994, at 1, 3.

[44] Correspondence from E.P. Taptich, Apollo counsel, to Mr. A. Richard Metzger, Common Carrier Bureau, June 29, 1994, at 9.

Third, Apollo's claim that GTECA would confront "conflicting installation, maintenance and/or repair demands" is no different from the situation which exists in the telephony business every day -- numerous customers are *always* requesting installation, repair and service order changes.[45] These requests have all been processed through GTECA's systems and each customer's -- and their subscriber's -- needs have been timely met. Despite Apollo's best efforts,[46] service to the residents of Cerritos has been uninterrupted.[47]

Despite Apollo's rhetoric, a close examination of the facts in this instance makes clear that GTECA has favored neither customer over the other. Apollo's claims of "collusion" and "anticompetitive conduct" should be recognized for precisely what they are -- simply more hyperbole.

---

[45] *See* Correspondence from G.L. Polivy, GTE, to Mr. A. Richard Metzger, Common Carrier Bureau, July 8, 1994, at 6-7.

[46] For example, on the tariff effective date Apollo "locked-out" GTECA personnel from the headend room which GTECA subleases from Apollo, thereby disabling GTECA from maintaining the headend equipment and putting the residents of Cerritos at risk of a system failure. Apollo only relented, and allowed GTECA back into its leasehold, when GTECA threatened immediate legal action.

[47] Throughout these proceedings, the Commission should remain cognizant of Apollo's repeated tendency to selectively present facts and to omit relevant facts when it serves its purpose. For example, in its Petition to Reject, Apollo claimed that because GTECA was assuming maintenance responsibilities, "monthly revenues of $17,500 to Apollo [w]ould thereby be withdrawn." What Apollo chose not disclose (although Apollo had to admit later) was that Apollo was occurring substantial costs -- nearly $30,000 a month -- to perform maintenance as GTECA's contractor. Thus, GTECA's assumption of maintenance actually caused Apollo to realize a *net savings* of more than $10,000 a month. The Commission could have been easily misled by Apollo's claims if a close examination of the true facts -- presented by GTECA -- had not occurred.

IV. The Tariff Submitted for Service Corp. (Transmittal 874/909/918) Does Not Exceed GTECA's Existing or Requested Section 214 Authority.

It is now undisputed that the Section 214 authority granted by the *Cerritos Order* in 1989 expired in July, 1994. *GTE California Incorporated v. F.C.C.*, 39 F.3d 940 (9th Cir. 1994). GTECA is currently providing service under interim authority granted by the Bureau while its current Section 214 application is pending. *Supplemental Designation Order, slip op.* at 3-4. Consequently, despite Apollo's contention,[48] the authority granted by the Commission in 1989 – which has now expired – cannot in any manner limit the provisions of the tariffs. Only GTECA's existing – and pending – Section 214 authority may do so. If the Commission limits GTECA's Section 214 authority to continue to provide video channel service to Apollo and Service Corp., than GTECA will modify its tariffs accordingly. Thus, GTECA's pending application provides no basis to reject the tariff submitted for Service Corp., as Apollo baldly contends.

V. The Tariff Rates Proposed for Service Corp. Are Not Discriminatory.

In opposition to the tariff submitted for Service Corp.. Apollo presents a consultant's analysis of which claims that the lease charge Apollo expressly agreed to years ago should be (retroactively) reduced, that Apollo is somehow (now) due a refund, and that certain expense amounts that should be "disallowed" be lumped on the charges applicable to Service Corp.[49] In reality, the study performed by Montgomery Consulting (Montgomery) is a convoluted distortion of the facts presented in this proceeding, designed to produce a single result for its client – the wrenching of a

---

[48] Supplemental Opposition, at 14-16.

[49] Supplemental Opposition, at 16-20.

monetary refund from GTECA for which Apollo has no legal or economic right. If the assumptions and conclusions presented by Montgomery were accepted by the Commission, the end result would force either GTE stockholders or California ratepayers (or both) to fund a portion of Apollo's monopoly cable television operations and would result in disparate charges for identical services in violation of Section 202 of the Act.

A. Analysis of the Tariff Charges.

GTECA has demonstrated that the charges applied to Service Corp. are non-discriminatory and are reasonable since they recover the underlying regulated costs that GTECA proposes to transfer into regulated accounts. GTECA's tariffing and pricing methodologies insure that the costs of the Cerritos operations are borne equally by Apollo and Service Corp, the only two users of the system, and that no ratepayers of other telecommunications services provided by GTECA will subsidize the costs of providing video channel service in Cerritos. GTECA has painstakingly detailed the calculations and methods it used to tariff charges for Apollo and compute rates applicable to Service Corp. However, due to the distortion of the facts presented by the Montgomery study, a summary of these steps bears some review.

Charges related to the lease of capacity on the Cerritos broadband network for both Apollo and Service Corp. were based solely on the investment incurred by GTECA in the underlying coaxial network and headend equipment. Pursuant to the original agreement negotiated in January 1987, the rental payment was agreed to be "...the sum necessary to amortize the Owner's Recoverable Construction Cost and provide the Owner an annual economic rate of return on the Owner's Recoverable Construction Cost over the initial 15 year term...". Lease Agreement, at Exhibit B. For an interim